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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA,

Appellants,

vs,

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CLAUDE T. RENO,
Attorney General of Pennsylvania;
FRANK E. COHO,
Deputy Attorney General of Pennsylvania,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1

Table of Cases Cited.

Alabama v. *King and Boozer*, 314 U. S. 1, 62 S. Ct. 43	2
Baltimore and Annapolis Railroad Co. v. *Lichtenberg, United States Intervener*, 176 Md. 383, 4 A. (ad) 734	2
Curry v. *United States*, 314 U. S. 14, 62 S. Ct. 48	3
James Stewart & Co. v. *Sadrakula*, 309 U. S. 94, 60 S. Ct. 431	2
United States v. *Baltimore and Annapolis Railroad Co.*, 308 U. S. 525, 60 S. Ct. 297	2
United States v. *Oklahoma Gas & Electric Co.*, 297 Fed. 575	3

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

PENN DAIRIES, INC.,

Appellant,

AND

THE UNITED STATES OF AMERICA,

Intervenor-Appellant,

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.

January Term, 1942, No. 173.

(Appeal of the Penn Dairies, Inc., in Which the United States Has Intervened.)

January Term, 1942, No. 180.

(Appeal of the United States)

STATEMENT AGAINST JURISDICTION OF SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS OR AFFIRM APPEAL.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

In accordance with Rule 12, paragraph 3, of the Supreme Court of the United States, the Milk Control Commission

of the Commonwealth of Pennsylvania hereby sets forth its reasons against jurisdiction of the Supreme Court of the United States in the above case and respectfully moves that Honorable Court to dismiss the appeal allowed by the Supreme Court of Pennsylvania or affirm its decision, as follows:

1. It is respectfully submitted that there is no substantial question involved, because Penn Dairies, Inc., is admittedly a contractor with and *not an employe or agent of* the Government of the United States. In *Baltimore and Annapolis Railroad Co. v. Lichtenberg, United States Intervener*, 176 Md. 383, 4 A. (2d) 734 (1939), an attempt was made to appeal from a decision of the Supreme Court of Maryland holding that a certificate to operate as a contract carrier was necessary for a contractor hauling employes of the Federal Government. The Supreme Court of the United States in *United States* v. *Baltimore and Annapolis Railroad Co.*, 308 U. S. 525, 60 S. Ct. 297 (1939), dismissed the appeal in the following language:

> "The appeal is dismissed for want of a substantial federal question."

This decision was cited with approval in *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104, 60 S. Ct. 431 (1940).

2. There is no substantial federal question involved because there is admittedly *no discrimination between the United States and the State of Pennsylvania itself in the operation of the Milk Control Law*, and because no substantial burden is placed upon the United States by the operation of the Milk Control Commission. Any question of burden on the United States was resolved in favor of the Milk Control Commission of Pennsylvania by the decision of the Supreme Court of the United States in *Alabama* v. *King and Boozer*, 314 U. S. 1, 62 S. Ct. 43 (1941), and

Curry v. *United States*, 314 U. S. 14, 62 S. Ct. 48 (1941). In those cases a sales tax and a use tax, respectively, were upheld where the tax was imposed upon a contractor erecting an army camp for the United States under a "cost-plus" contract. In both cases the tax was upheld as no substantial burden upon the United States even though the amounts to be paid by the United States under the contracts were increased by the amount of the tax. An even more striking case is *United States* v. *Oklahoma Gas & Electric Co.*, 297 Fed. 575 (C. C. A. 8, 1924) in which it was held that the United States was bound to pay increased electric rates prescribed by a state rate-fixing commission even though the electric current was being supplied under a contract still in force for a lower rate at the time the rate change was made.

WHEREFORE, the Milk Control Commission of the Commonwealth of Pennsylvania, appellee, respectfully prays that the Supreme Court of the United States dismiss the appeal in the above cases to the Supreme Court of the United States or affirm the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

(Signed) CLAUDE T. RENO,
Attorney General;
FRANK E. COHO,
Deputy Attorney General,
Attorneys for the Milk Control
Commission of Pennsylvania,
Appellee.

STATE OF PENNSYLVANIA,
County of Dauphin:

John M. McKee, being duly sworn according to law deposes and says that he is Chairman of the Milk Control

Commission of Pennsylvania, and that the facts set forth in the foregoing statement are true and correct.

JOHN M. McKEE.

Sworn to and Subscribed before me this 26th day of August, A. D. 1942.

LUCILLE A. STROUP,
Notary Public.

[SEAL.]

My Commission Expires March 5, 1943.